IN THE

Supreme Court of the United States

October Term, 1955

No. 320

GEORGE B. PARR, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

GEORGE B. PARR, *Petitioner,*

v.

BEN H. RICE, *District Judge.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The brief of the Government is a sweeping defense of the position that the Attorney General has the absolute right to circumvent Rule 21(a) of the Federal Rules of Criminal Procedure. This Rule relates to the transfer of criminal cases on account of prejudice against the defendant in the forum chosen by the Government for the prosecution of the case.

There is no dispute as to the effect of the Attorney General's action in this case. For 20 years, without exception, the Government had filed income tax

evasion cases only in the Western District of Texas (Austin). It broke this practice in this case to initiate prosecution of this defendant in the Corpus Christi Division of the Southern District. On motion of petitioner under Rule 21 (a), and on the basis of voluminous evidence, the District Court found "so great a prejudice against Defendant that he cannot obtain a fair and impartial trial in this case in such division." (R. 15). Accordingly, the Court transferred the case to the Laredo Division, finding that the evidence does not show "that the Government either will or might 'be under a severe handicap' in the prosecution of this case" in Laredo. (R. 19).

Six days later, the Department of Justice in Washington authorized the local United States Attorney to seek an indictment for the same offense in the Western District (Austin) and *if* such indictment were obtained, to dismiss the first indictment which had been transferred to Laredo in the Southern District (R. 20). The second indictment was promptly obtained on the same day. On the next day, the United States Attorney filed a motion to dismiss the first indictment under Rule 48 (a) and subsequently obtained an order permitting dismissal (R. 80).

The effect of the Government's action was to transfer trial of the defendant for the alleged offense to a district of its second choice. Rule 21 (a) "provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution. . . ."[1] The Government's action circumvented the rule, denied defendant the benefits of an order entered after

[1] Notes of Advisory Committee on Federal Rules of Criminal Procedure, 18 U.S.C.A. Rule 21, p. 243.

bitter contest, and amounted to nullification of the order of court by circuitous means.

As the Government states, "*The effect* [*of its action*] *was indeed to negate the transfer order*" (G. Br. 72).

The motivation was the Government's displeasure with an order entered in a forum originally chosen by it, transferring the case to a venue which the court had adjudicated to be fair to both sides.

The Government seeks to defend this extraordinary and unprecedented course of action in an 82-page brief. Before addressing ourselves to the specific arguments of this brief, we wish to point out the basic proposition which it maintains: That the Rules of Criminal Procedure and the orders of courts under them relating to the place of trial may *always* be defeated, in multiple venue situations, by the Attorney General's asserted absolute right to obtain multiple indictments, to elect the indictment and the forum in which he will prosecute, and to obtain dismissal under Rule 48(a).[2]

We submit that the Attorney General has no such absolute, unqualified right. Ordinarily, of course, he

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[2] In the trial court, the Government argued that the defendant had no standing under Rule 48 (a) to contest the Attorney General's motion to dismiss. (Memorandum Opinion, R. 28; Statements of Government Counsel, R. 24, 48). They seemed to be of the opinion that, except when during the trial", the trial judge's function under Rule 48 (a) is ministerial; that its purpose "was merely to give the Court control over the entries made in his docket. . . ." (R. 44).

Indeed, the Government's claim as to the absolute nature of its right to elect is so sweeping that they assert that this Court cannot give petitioner effective relief by reinstating the first indictment. The Government asserts that even in this event, the Attorney General would exercise his right to elect to proceed under the second indictment. (G. Br. 36-38).

has the right and duty to choose the forum for trial within applicable principles governing venue. And ordinarily, he has the right and duty to elect as between two jurisdictions in which to prosecute. But this right is *not* absolute. The Attorney General's choice in a multiple indictment situation will be set aside if the result of his election amounts to an abuse of power, or deprives the defendant of an important right, or results in "negating" an order of court or in circumventing the rules of procedure prescribed by this Court.

In making its extreme claim of power, the Government relies upon *Haas* v. *Henkel*, 216 U. S. 462 (G. Br. 38-39, *passim*). But *Haas* expressly recognizes that the Attorney General's power to elect the place of trial in a multiple indictment situation, is *not* absolute, but qualified. In the *Haas* case, this Court stated, that "*Primarily*", the election as to where the defendant shall be tried is the "right and duty of the Attorney General . . ." (216 U. S. at 474). But, the Court continued, "If unreasonable delay should result from continuances due to an election to try the same accusations in another district, a very different question might arise, calling for relief through habeas corpus." (216 U. S. at 474).[3]

Obviously, unreasonable delay is not the only circumstance that will defeat the Attorney General's election. The present case, we believe, provides another and a clear instance of the limitation of this right. The Attorney General cannot, however elaborately he may proceed, elect to prosecute for the same of-

[3] The reference to habeas corpus is due to the fact that the proceedings in *Haas* were upon removal of the defendant, and the issue was raised by application for habeas corpus.

fense under a second indictment in another district, obtained after transfer of the first indictment, where the deliberate purpose and the effect of his action are: (1) to nullify a court order, duly entered by a court having jurisdiction; (2) to repudiate a proceeding in a forum of its own, original selection because it did not like an order entered therein; (3) to reject trial in a forum expressly adjudicated to be favorable to neither side and to transfer prosecution to a second jurisdiction chosen after this adjudication; and (4) to circumvent and defeat the rules of criminal procedure, prescribed by this Court pursuant to statute, which vest the power to move for transfer solely in the defendant and deny that power to the Attorney General (Rule 21 (a)).

APPEALABILITY

The Government argues that the order of the Southern District dismissing the first indictment on motion of the Government, "does not appear to be appealable" (G. Br. 33), and that it cannot be reviewed by prerogative writ. Nevertheless, the Government states that "we would prefer to have a decision from this Court on the merits, so as to forestall the possibility of further delay" presumably resulting from an attempt to appeal after judgment on the second indictment (G. Br. 33).[4]

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[4] The Government refers this Court to a statement in *Holdsworth* v. *United States*, 179 F. 2d 933, 935 (1st Cir. 1950), which it apparently believes indicates the possibility of a ruling on the merits because of "the practical need for clarification". (G. Br. 47). We do not believe it necessary to join in this invitation to this Court because we believe that this Court's decisions furnish an adequate basis for the exercise of jurisdiction.

Aggrievement

The Government's first point is that petitioner is not aggrieved by the order under Rule 48 (a), dismissing the first indictment. It takes the position that to determine aggrievement, we may not look beyond the fact that the indictment was dismissed. According to the Government, the dismissal of the indictment must be viewed, for purposes of determining whether defendant was aggrieved, as terminating the prosecution.[5]

This position has no basis in reality or in law. Petitioner was certainly aggrieved by the dismissal order. The result of the dismissal was to "negate" (G. Br. 72) an order entered on defendant's motion fixing the place in which "the prosecution shall continue" (Rule 21 (c)), and to force defendant to trial in another district under another indictment for the same offense.

The difference between a *bona fide* dismissal terminating prosecution for the offense, and a dismissal for purposes of trial under another indictment for the same offense, is demonstrated by the very case upon which the Government relies: *Lewis* v. *United States*, 216 U. S. 611. In *Lewis* this Court refused to entertain an appeal from a *nolle prosequi*, but significantly, it expressly pointed out that no new indictment for the alleged offense had been returned, and the defendant could no longer be prosecuted because the statute of limitations had run.[6]

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[5] Under its next point, "finality", the Government says that the order of dismissal was not a "final decision" since it did *not* terminate the prosecution.

[6] *Cf. United States* v. *Shelley*, 218 F. 2d 157 (2d Cir. 1954), in which the court held an order of dismissal for lack of venue to be "final and appealable" but decided that appellant could not prosecute the appeal since he received the contested order of dismissal at his own request. . . ." (218 F. 2d at 158).

In the present case, the situation is the precise opposite of that presented in *Lewis*. Here, the second indictment was returned before the first was dismissed—indeed, before the motion for *nolle prosequi* was filed. It was made expressly clear that the motion to dismiss would not have been filed unless the second indictment had been obtained. The United States Attorney's authorization to file the motion for *nolle prosequi*, which was filed in support of the motion to dismiss, was expressly conditioned upon the return of the second indictment (R. 20).[7] He could not have *nolle prossed* the case except for the second indictment because of lack of authority to do so.

The purpose and effect of the dismissal were not to release defendant from prosecution, but to prosecute him in another forum, and to deprive him of his right, established after contest, to trial of the case in the transferee forum pursuant to Rules 21 (a) and (e). The Government argues that petitioner was not aggrieved because he had no right to trial in the forum to which the case had been transferred. This is simply another way of saying that Rules 21 (a) and (e) establish no procedural rights. In the circumstances of this case we submit that there can be no doubt as to petitioner's aggrievement.[8]

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[7] The teletyped authorization was as follows: "You are Authorized to Dismiss Indictment Pending in Southern District of Texas against George B. Parr for Violations of Section 145(b) Internal Revenue Code 1939 *if and when Indictment Returned in Western District.*" (Emphasis supplied) (R. 20)

[8] Dismissal of a case for reasons relating to venue has sufficiently "aggrieved" the Government that it has successfully prosecuted appeals from the dismissal orders. *In United States v. National City Lines, Inc.*, 334 U. S. 573, the Government appealed to this Court from an order entered, prior to the enactment of Section

Finality

The Government, however, professes to see a "second obstacle" to petitioner's standing to appeal. It urges that the order dismissing the first indictment is not "final" for purposes of the requirement of a "final decision" under 28 U. S. C. § 1291.[9] Relying on *Berman* v. *United States*, 302 U. S. 211, it asserts that appeal can be had in a criminal case only from "final judgment" and that final judgment means "sentence". (G. Br. 40 *et seq.*).

We respectfully submit that the Government's use of *Berman*, as well as its discussion of *Stack* v. *Boyle*, 342 U. S. 1; *Swift & Co.* v. *Compania del Caribe*, 339 U. S. 684; and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, demonstrates the inadequacy of its analysis.

1. In *Berman*, this Court allowed appeal in a criminal case, on the ground that final judgment had been entered even though the sentence had been suspended. The Court addressed itself only to the meaning of "final judgment" in the context of appeal from a judgment in the facts. This satisfied the necessities of the case before the Court. The Court did not consider the requirements for appeal from other types of

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1404(a), dismissing the complaint on the grounds that it should in fairness be brought in another jurisdiction. It is interesting that the Government felt itself sufficiently aggrieved in that case that, instead of filing the action in the other jurisdiction, it appealed to this Court. See also *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 798.

[9] Compare the Government's argument that the order of dismissal was so final that the defendant was not aggrieved by it.

orders, and did not define the broader term "final decision".[10]

2. In *Cobbledick* v. *United States*, 309 U. S. 323, this Court, holding that appeal does not lie from denial of motions to quash grand jury subpoenas, delineated the problem of "finality" in criminal appeals. It pointed out that the momentum of judicial administration would be arrested "by permitting separate reviews of the component elements in a unified cause." (309 U. S. at 325). But it pointed out that "finality is not a technical concept": "It is the means for achieving a healthy legal system." (309 U. S. at 326). "Due regard," said the Court, "for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes" (309 U. S. at 329).

3. Following *Cobbledick*, this Court has consistently declined appellate jurisdiction in cases where the order concerned is "one of the component elements in a unified cause". But it has also allowed appeals where "the decision . . . finally determine(s) claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546.

4. The quoted statement, in *Cohen*, following *Cobbledick*, was the basis of this Court's allowance of the appeal in *Swift & Co.* v. *Compania del Caribe*, 339

[10] *Cf.* The interpretation set forth in the concurring opinion of Jackson and Frankfurter, JJ., in *Stack* v. *Boyle*, 342 U. S. 1 at 12.

U. S. 684. In that case, this Court, after noting that a delay of appeal would destroy its practical value, stated that in these circumstances the provision requiring finality "should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process" (339 U. S. at 689).

5. Finally, *Cobbledick* and *Cohen* were reflected in *Stack* v. *Boyle*, 342 U. S. 1, in which this Court held that an order relating to bail, although it does not dispose of the merits of the criminal case, is a "final decision" which may be appealed. In the concurring opinion of Jackson and Frankfurter, JJ., the difference between a decision on a separable issue, such as bail, and one which would halt the orderly progress of the litigation was reiterated (342 U. S. at 9 et seq.).

We do not suggest that every separable decision determining a right under the Constitution, statute or rules is or should be appealable. We do not, for example, suggest that every decision granting or denying motions for transfer under Section 1404 (a) or Rule 21 (a) is or should be appealable. Even where the decision appealed from is severable, as this Court has noted, the importance of the decision and the effect of a denial of appeal are certainly factors to be considered (*cf.* the quotation from *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U. S. at 546; *Swift & Co.* v. *Compania del Caribe*, *supra*, 339 U. S. at 689).[11]

[11] "That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned." *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793, 794 n. 1. "An order of dismissal for lack of venue, contrary to the assertion of the government, is final and appealable". *United States* v. *Shelley*, 218 F. 2d 157, 158 (2d Cir. 1955).

The present case, however, fits squarely within the lines established by this Court.

(1) It is an appeal from a final decision terminating the prosecution on the first indictment and ending the case so far as the District Court for the Southern District is concerned. The fact that the dismissal "leaves the merits undetermined and may not be a bar to another action does not make it interlocutory . . . This gives it the requisite finality for the purposes of a review." *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92 at 96.[12]

(2) In any event, the order of dismissal determines rights "fairly severable from the context of a larger litigious process." *Swift & Co.* v. *Compania del Caribe*, 339 U. S. 684, 689. The issue on this appeal is not petitioner's ultimate guilt or innocence. It is his right to the benefits of Rules 21 (a) and (c), and to trial on the offense charged in the forum to which the court transferred the first indictment following full hearing and a determination that the transferee forum is fair to both sides. This matter is preliminary to adjudication on the merits.

(3) The issue is of great importance. Essentially, it involves the proper administration of the rules prescribed by this Court and the question of the power of the Attorney General to "negate" an order of court and circumvent the rights acquired by a defendant pursuant to Rules 21 (a) and (c).

This Court has frequently noted that the proper administration of its rules of procedure is a matter

[12] To the same effect is *United States* v. *Wallace & Tiernan Co.*, 336 U. S. 793. See also our Main Brief, pp. 27-28.

peculiarly calling for its exercise of jurisdiction. Indeed, as we discuss hereinafter, this Court has even entertained direct application to it for prerogative writs in cases involving important questions under its rules, without prior application to the Courts of Appeals. *Los Angeles Brush Corp.* v. *James, D. J.*, 272 U. S. 701; *McCullough* v. *Cosgrave, D. J.*, 309 U. S. 634; see comment of Mr. Justice Frankfurter, dissenting, in *Ex Parte Republic Of Peru*, 318 U.S. 578, at 599; *cf.* Stone, C. J., in *Roche, D. J.* v. *Evaporated Milk Ass'n.*, 319 U. S. 21, at 31.

We respectfully submit that the invention and use by the Department of Justice of the present device to circumvent and *pro tanto* to nullify Rule 21 (a), with the acquiescence of a District Judge who, as we shall discuss, proceeded on a limited and erroneous conception of his duty and authority, require intervention and correction by this Court.[13]

The effect of the decision appealed from is, in dual venue cases, to reduce to an empty rite the privilege given to defendants by that rule to obtain transfer of criminal indictments where "so great a prejudice" exists that the defendant "cannot obtain a fair and impartial trial in that district or division"; and to establish for the Government the right to prosecute in a forum that it has chosen avowedly in order to "negate" a court order (G. Br. 72).

Moreover, unless this order is reviewed at this time, any possibility of effective review will be lost. The Gov-

[13] It should be noted that if the device used by the Department in this case is valid, it is available to the Government to defeat Rules 21 (a) and (c) and the rights of defendants and court orders thereunder in the vast number of cases where venue may be laid in more than one place. See, *e.g.*, 18 U.S.C. § 3237.

ernment professes to believe that the order will be reviewable on appeal from the final judgment after trial on the second indictment before Judge Rice in the Western District of Texas (Austin). At that time, however, the situation would indeed be anomalous: (1) We would not be asserting prejudicial error in the Austin trial, but would be complaining because of a decision in another forum: i.e., because petitioner had not been brought to trial in Laredo; (2) we could not reasonably assert that a different result would have been reached at trial in Laredo; (3) we would be appealing from a sentence after a jury verdict in the Western District before Judge Rice, on account of error in a decision which was made in the Southern District before Judge Kennerly and which Judge Rice could neither set aside nor modify. In these circumstances, we fear that the generous concession of the Government would be unavailing, and that our appeal would be met with the response that the error complained of is non-prejudicial and in any event, cannot be reached on appeal from judgment on the second indictment.[14]

PREROGATIVE WRITS

The Government's brief asserts that this is not an appropriate case for the issuance of prerogative writs. On the contrary, this case is typical of situations in which this Court has issued such writs in the absence of appeal or appealability, to compel or prohibit the exercise of jurisdiction and to enforce conformity with its rules.

The effect of the dismissal of the first indictment is (1) that the Southern District declines to exercise

[14] *Cf. Ford Motor Co. v. Ryan*, 182 F. 2d 329, 330 (CA 2, 1950); cert. den. 340 U. S. 841.

jurisdiction over the prosecution, and (2) that the Western District is proceeding to exercise jurisdiction with respect to the alleged offense, although the result of so doing is to effectuate the Attorney General's scheme to nullify the Southern District order and circumvent the rules prescribed by this Court.

This Court has on various occasions issued writs of mandamus and prohibition to compel inferior courts to exercise jurisdiction and to prohibit them from doing so. *United States* v. *Smith*, 331 U. S. 469; *Maryland* v. *Soper*, 270 U. S. 9; *McCullough* v. *Cosgrave*; *D.J.*, 309 U. S. 634; *Ex parte Republic of Peru*, 318 U. S. 578. In the latter two cases, as we have noted, this Court even entertained direct applications to it for the writs, without requiring prior recourse to the Court of Appeals.

The use of such writs is not confined, as the Government seeks to imply, to situations in which a court technically without jurisdiction seeks to exercise it, or in which a court refuses to exercise jurisdiction because of the erroneous view that it lacks jurisdiction (G. Br. 48-49). For example, in *McCullough*, *supra*, mandamus was issued to compel the District Judge to vacate an order referring the case to a Master, contrary to the equity rules. See also *Los Angeles Brush Mfg. Co.* v. *James, D. J.*, 272 U. S. 701 (similar situation) and *In re Simons*, 247 U. S. 231 (mandamus to require District Court to proceed with trial of a contract count at law).

Indeed, as we have stated, this Court has expressly recognized the peculiar appropriateness of the use of prerogative writs to require the courts to conform with the rules of procedure. In *Los Angeles Brush Mfg. Co.* v. *James, D. J.*, 272 U. S. 701, this Court stated:

> "... we think it clear that, where the subject concerns the enforcement of the equity rules which by law it is the duty of this court to formulate and put in force, and in a case in which this court has the ultimate discretion to review the case on its merits, it may use its power of mandamus and deal directly with the District Court in requiring it to conform to them." 272 U. S. at 706.

In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, the Court refused to permit use of the writ because "there are in this case no special circumstances which would justify the issuance of the writ, *such as the persistent disregard of the Rules of Civil Procedure* ... prescribed by this court, found in *McCullough* v. *Cosgrave*, 309 U. S. 634 ..." (319 U. S. at 31).

Accordingly, we submit that this Court, consistently with its precedents, may issue writs of mandamus and prohibition as requested by the petitioner in No. 202 Misc. Mandamus may be issued, in lieu of reversal on certiorari in No. 320, to compel the Judge of the Southern District to vacate the order dismissing the first indictment and to proceed with trial in Laredo pursuant to the order of transfer duly entered under Rule 21 (a). As also requested in No. 202 Misc., the Court may effectuate either its order of reversal on certiorari in No. 320 or its mandamus to the Judge of the Southern District, by mandamus or prohibition to the Judge of the Western District (Austin), to prevent him from proceeding with the second indictment.

We submit that this Court has ample power, as described, and may use that power consistently with its precedents, to assure that petitioner receives relief despite the Government's bold assertion that whatever might be the views of this Court, the Attorney General

could nevertheless effectuate his plan to "negate" the order of transfer. (G. Br. 72).

THE MERITS

The Government incorrectly states petitioner's position on the merits. We do *not* assert that the District Court lacks power *in any circumstances* to grant a motion to dismiss under Rule 48 (a) following a change of venue. (G. Br. 49-50). Obviously, for example, dismissal would be appropriate even after transfer under Rule 21 (a) if it were a *bona fide* abandonment of the prosecution as in *Lewis* v. *United States*, 216 U. S. 611. That, however, is not this case. Our position is as follows:

(1) We assert that the District Court is required by Rule 48 (a) to adjudicate the reasons, if any, given by the Government for its motion to dismiss, and to exercise real discretion in granting or denying dismissal. We submit that Judge Kennerly misconceived his role in this respect.

(2) We also assert that in this case the District Judge in any event wrongfully granted dismissal because the purpose and effect of the dismissal were to permit the Attorney General to "negate" a valid, subsisting order of the court; to nullify and circumvent Rules 21 (a) and (c) prescribed by this Court; and to effect a transfer of the case to a second jurisdiction which it had chosen for the sole purpose of defeating the court's order and depriving petitioner of the benefits thereof, although the rules deny to the prosecution power to apply for transfer.[15]

[15] Rule 21(c) provides that after transfer, "the prosecution shall continue" in the district or division to which the case is transferred. We believe that this rule means what its says, and that if prosecution for the offense is to continue, it must proceed in the transferee venue. See Main Brief, pp. 12-19.

We submit that the reason why this Court, despite a contrary recommendation of its Advisory Committee,[16] insisted that Rule 48 (a) require "leave of court" to dismiss an indictment, was to make certain that the District Courts actively supervise motions under the rule to prevent the Government from dismissing cases for improper reasons. We submit that among the reasons which are improper are the purpose of shopping around for a forum and harassing defendants by multiple indictments. We believe that it is the duty of the Government to make an initial choice of forum with care and fairness, and that, having made its choice, the Government cannot repudiate the chosen forum because it is displeased with the consequences. We do not believe that the Government may make "a test run in one jurisdiction"[17] and then start a proceeding in another jurisdiction because it is not pleased with an order entered in the first jurisdiction. We believe that the court's duty under Rule 48 (a) to supervise dismissal of an indictment was designed to prevent precisely this sort of trifling with court processes and the rights of defendants.[18]

It seems entirely clear that Judge Kennerly misconceived his function under Rule 48 (a). He ob-

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[16] Federal Rules of Criminal Procedure, Preliminary Draft (1943) 191.

[17] This is the phrase used by Cameron, J., dissenting below (R. 109).

[18] The language of *Hampton* v. *Williams*, 33 F. 2d 46, 49 (8th Cir. 1929) is applicable here:

> "Congress did not intend that a party could voluntarily proceed in the court where the suit was filed until he became dissatisfied and then transfer the case. It gave him the privilege to go ahead in one or the other court, as he desired, but he could not experiment with both."

viously did not feel that the Government was required to show reason for the dismissal. He felt that it should be granted, as he had always granted dismissals requested by the Government "in twenty-four years on the bench" (R. 79). He stated that he did not feel that the *defendant* had adduced facts to compel him to overcome this routine practice.[19]

The plain truth of the matter is that the Government had no proper reason for dismissal. The dismissal was sought in order to avoid trial in the transferee venue (Laredo) which the court had adjudicated to be fair to both parties. The Government's occasional suggestion that it had another reason for trial in the Western District (Austin): namely, that upon "reappraisal" *after* the transfer order was entered, it decided that proof of venue in the Western District would be easier than in the District where it obtained the first indictment—is patently improvised. (G. Br. 73-74). It undoubtedly considered with great care the relative merits of the two forums in all respects, before it broke with its practice of 20 years to bring this particular prosecution of this particular defendant in the Corpus Christi Division of the Southern District where rampant prejudice existed against him.

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[19] Circuit Judge Cameron, dissenting, summarized the situation as follows:

> "It is clear that the Court of the Southern District applied the wrong tests in deciding that the indictment first brought might be dismissed. If it had required the Government to establish a sound legal reason for the dismissal, giving due consideration to the rights of both parties, it is difficult to conclude that the right to dismiss would have been sustained, so barren is the record of any such showing. When all of the talk is boiled down, it points to the fact that the Government was wholly displeased with the prospect of a trial in a venue the court had adjudicated to be fair." (R. 110).

In the absence of good cause shown by the Government, the District Judge should have denied dismissal under Rule 48 (a). Certainly in this case, where the purpose and effect of the dismissal were improper, its denial was required. The Government did not seek dismissal because of legitimate reasons relating to the merits of the case. It sought dismissal in order (1) to evade the consequences of a valid transfer order, and (2) in effect to secure for itself the right to transfer the prosecution to a forum of its second choice. In short, it sought to use the device of dismissal under Rule 48 (a) to secure for itself the privilege of transfer denied to it by Rule 21 (a).

The Government had not the right even to apply for transfer from Laredo. It sought to arrogate the right not merely to apply for transfer but to accomplish it by the device of a second indictment in Austin and dismissal of the first indictment. We respectfully submit that this attempted manipulation of the rules is not permissible.[20]

The Government makes alternative suggestions which perhaps deserve brief comment: First, that

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[20] The Government seems to argue that *it actually does possess a right to seek transfer of a criminal case.* It argues as follows (Gov. Br. 54-55): (1) the Advisory Committee Notes state that the Government has no right to secure a transfer of the Criminal case. (2) The Advisory Committee refused the Government any transfer privileges because of the Constitutional venue rights of defendants to trial in the place where the crime was committed. (3) Since in this case the crime was committed in Austin as well as Corpus Christi the Advisory Committee's restriction does not apply and the Government does have a transfer privilege here.

We agree, as the Government seems to concede that it was here arrogating to itself a privilege of transfer. But we search in vain for any statutory or rule authority for it. The Rule grants it none in terms, and it cannot create such a privilege for itself by a devious and calculated misuse of the dismissal power provided in Rule 48.

Judge Kennerly's order under Rule 48 (a) may be viewed as "undoing what he had done in transferring the case to Laredo." (G. Br. 56). The short answer is that this was not the situation. Judge Kennerly ruled upon a motion for dismissal under Rule 48 (a), not for reconsideration of his order under Rule 21 (a). He was undoubtedly affected by his view that his authority under Rule 48 (a) was narrowly confined. It is the sheerest speculation to suggest how he would have decided a motion to reconsider his transfer order which was entered after elaborate argument and upon voluminous evidence which he "carefully studied". (R. 14). It is, however, significant that the Government instead of applying to him for reconsideration or seeking review in the appellate courts, took matters in its own hands by the procedure which it adopted.

Second, the Government argues that if there was error below, it consisted in Judge Kennerly's view that he could transfer the case only to the Laredo Division. Again, the short answer is that if this was error, it could have been attacked by the Government directly, by appropriate petition for reconsideration and by petition for mandamus to appellate courts to require the Judge to exercise his jurisdiction to choose the transferee forum from among all which the Government contends to be legally available. Certainly, the Judge's error in this respect, if it be error, does not give the Attorney General a right to nullify the transfer order and to circumvent Rules 21 (a) and (c) by the device of a second indictment and dismissal of the first indictment.

CONCLUSION

For the reasons stated, we respectfully submit that this Court grant petitioner's prayer for relief so that trial of the cause may proceed in the Laredo Division of the Southern District of Texas.

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